

# **The Basics of AB205: The California Domestic Partner Rights and Responsibilities Act of 2003**

## **On Air Questions and Answers:**

- 1. What is a "domestic partnership" as defined by California law, and when did the first "domestic partnership" law go into effect?**

Domestic partners are "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." Fam. Code, § 297(a). Legislation was enacted and became effective on January 1, 2000, enabling domestic partners to register with the State of California and to obtain certain rights and benefits, to which the Legislature has added on a number of occasions.

- 2. Is there a formal process for two adults to declare themselves "domestic partners"?**

Yes. A domestic partnership is established in California when both persons file a Declaration of Domestic Partnership with the Secretary of State, and they (1) have a common residence; (2) are not married or related by blood in a way that would prevent them from marrying one another; (3) are at least 18; and (4) either are members of the same sex, or one or both of them is over 62 and eligible for Social Security. Fam. Code, § 297(b).

The domestic partnership must be registered with the State for the rights and obligations under California's statutory scheme to apply. The registration form, with notarized signatures of both partners, must be filed with the Office of the Secretary of State. Licenses are not issued by county clerks, nor are certificates of registry submitted to them. When a termination is being pursued, the partnership may be terminated by filing a "Notice of Termination" with the Secretary of State.

**3. What will the impact of the Domestic Partnership Act (DPA) be on the courts?**

The DPA will impact the courts in three main ways:

1. On the administrative level, decisions must be made about what to call the cases, how to enter them in the computer, how to deal with any new forms, and how to color code the files.
2. More Domestic Partners' cases may enter the courts although it is unlikely that there will be an immediate, large increase (at present, there are 25,000 domestic partnerships statewide).
3. Regardless of personal beliefs and feelings about the legislation, court staff must deal with cases in an open-minded, professional, and competent way.

**4. What is the rationale for including heterosexual couples over the age of 62 in the law?**

Unmarried recipients of social security will not see a reduction in their benefits that could occur if they were married.

**5. Can you explain what is meant by "the law giving domestic partners almost all of the rights of married couples"?**

AB 205 broadly provides that, with a few express exceptions (such as joint filing of income taxes), "Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under the law, whether they derive from policies, statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses." Fam. Code, § 297.5(a). Similar provisions require parallel treatment of former registered domestic partners and former spouses, and of surviving registered domestic partners and widows or widowers. Fam. Code, § 297.5(b)-(c). Likewise, "[t]he rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses." Fam. Code, § 297.5(d). The guiding principle will be that, when

considering the rights or responsibilities of registered domestic partners under California law, the same procedures and the same substantive rules and principles that apply to spouses will govern.

**6. What are the most important areas of family law affected by the new law?**

The major change is that children born during the relationship will be presumed to be children of the domestic partnership. Unfortunately, the parentage statutes have not been amended to give any consideration to this. AB 205 requires that domestic partners be subject to the same rules as married persons. This is problematic because it requires that the spouse not be "sterile"—whatever that means in the context of a same-sex relationship. Additionally, provisions allow conflicts to be resolved by DNA testing—another problem because at least one partner is not the biological parent. When there are conflicting presumptions—a possibility—the conflict is to be resolved by looking to the presumption that is "founded on the weightier considerations of policy and logic controls." Fam. Code, §7612.

There are four main areas to be considered because of the presumption of parentage:

1. Notice requirements will be necessary, e.g., name changes, adoptions, guardianships, and juvenile dependency cases.
2. Custody/visitation issues will not change except for an increase in volume. We already have some of these cases in our court system. There may, however, be awareness and bias issues that we will have to consider.
3. Child support matters relating to parentage will appear on our child support calendars. Many of the conflict of presumptions issues will come up first in child support cases because those calendars are so focused on these issues.
4. Spousal support issues will be largely related to the notice requirements—"I never thought that I was agreeing to support this indigent person forever." "Length of the marriage" issues will also arise. Some of these are

long-term relationships, with a short-term partnership. It is clear that the period of time before the partnership "marriage" does not count toward a long-term "marriage," but it leaves open the *Marvin* actions that we have always had.

**7. Are there other areas of law affected by AB205?**

Other rights will be affected, for example, the right to:

- Apply the confidential spousal communications privilege and the privilege not to testify or to be called as a witness against a spouse.
- Sue for loss of consortium, for damages for attempted murder of a partner, and for violation of the right of publicity of a deceased partner; to appear on behalf of a partner in small claims court; and to defend a partner's rights in certain civil actions.
- Control disposition of remains, authorize autopsy, make anatomical gifts, and authorize exhumation.
- Avoid probate of jointly owned property, to protect against disinheritance by a partner, and to handle inheritance after the simultaneous death of partners.
- Cover partners in laws governing conflicts of interest by certain government officials based on personal relationships with parties, and exclusion of gifts from partners from limitations on judges' receipt of gifts.
- Use any necessary force to protect a partner from wrongful injury, to sue a person who provided illegal drugs to a partner, to obtain overnight visitation with partners who are in prison, and to obtain notice that a partner who is a parolee or probationer has certain medical conditions.
- Cover partners under laws prohibiting discrimination based on being or not being in the legal relationship.

8. **A number of questions have been raised about the retroactivity of AB 205. For example, do provisions relating to community property apply to property acquired from the inception of the domestic partnership or from January 1, 2005, forward?**

The Legislature this past term enacted AB 2580, which provides that, with respect to community property, mutual responsibility for debts to third parties, the right to seek financial support, and other rights and duties as between the partners concerning ownership of property, any reference to the date of marriage shall be deemed to refer to the date of registration of a domestic partnership with the state." Thus, community property rights should apply to property acquired from the date the domestic partners registered with the state. There is likely to be litigation regarding the constitutionality of this provision because of prior California Supreme Court precedent regarding due process in making marital property changes retroactive. Some, however, believe that due process has been provided because (1) notice was given of these changes, (2) the effect of AB 205's changes was deferred in order to allow parties to "opt out" of its provisions, and (3) AB 2580 allows partners to enter an agreement comparable to a prenuptial agreement up to June 30, 2005.

9. **How can registered domestic partners "opt out" of any or all of the changes being implemented by AB 205 but still be registered as domestic partners, if at all?**

There are two ways for couples to "opt out": (1) decide not to register with the state or terminate an existing registration before January 1, 2005, or (2) enter the equivalent of a prenuptial agreement before June 30, 2005.

10. **Which court will handle/decide these property acquisition issues if the parties terminate their relationship? Civil? Family law?**

If property is acquired after registration of the domestic partnership, and there is a dissolution, the family court

would have jurisdiction. If, however, the couple never registered with the state, or there are disputes regarding property acquired before dissolution, those disputes are likely to continue to be litigated in civil court, in which event the proceedings are likely to be bifurcated.

**11. What forms and procedures will judicial officers need in their courtrooms?**

Relevant forms are being modified by the Administrative Office of the Courts and will be available to you. Some Probate and Family Law forms have already been developed. You will have to make manual changes in computer programs until those programs are updated to account for any different scenarios that may arise. Otherwise, domestic partners in your courtroom are to be treated under the law in the same manner as married partners. The Judicial Council approved the modification of some, but not all, forms in family and probate before the effective date of the new law. Specifically, all forms that relate to dissolution, legal separation, and annulment, and all relevant probate forms have been changed.

**12. What are the impacts on guardianship?**

- Guardianship—In guardianship proceedings when either or both grandparents of the Domestic Partners (DP) seek custody of the DPs' child, all the Family Code provisions dealing with the custody of children come into play. Courts must consider the issues dealing with the children's best interests (Fam. Code, § 3011), stable and wholesome environment (Fam. Code, § 3040), detriment standards and burden of proof (Fam. Code, § 3041), presence of domestic violence (Fam. Code, § 3044), and abduction and other risks Fam. Code, § 3048).

**13. Which court will deal with issues regarding property acquired before the date of the DPs' registration?**

Generally family law courts will not deal with the contested division of property acquired before marriage—

Marvin type issues will be tried in the civil courts where the parties will have the right to a jury trial unless the parties stipulate to have the issues heard by a family law judge in a non jury trial setting.

**14. We have discussed some of the detailed provisions affected by the law. What are the basic things that every judge should know?**

I have my top 10 points.

1. Whenever the code says "spouse" think "spouse or domestic partner."
2. The law creates community property and spousal support rights for domestic partners.
3. The law creates a presumption of parentage for a child born during a domestic partnership.
4. This is California law—there are no federal consequences.
5. Applies only to "state registered domestic partners."
6. There is no tax benefit between domestic partners
7. There is no immigration benefit.
8. Don't rely on a formula or use the default settings on the computer to calculate partner support.
9. Benefits that are "family income based" may be negatively affected.
10. Watch out for the "effective date" of the law.